BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
THOMAS A. AND JO MERLYN CURDIE)

For Appellants: Thomas A. Curdie, in pro. per.

For Respondent: Bruce W. Walker
Chief Counsel

Claudia K. Land
Counsel

O P I N I O N

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Thomas A. and Jo Yerlyn Curdie against a proposed assessment of additional personal income tax in the amount of $128.01, plus interest, for the year 1974.

The issues presented are: (1) whether appellants are entitled to a moving expense deduction: and, if not, (2) whether appellants are also liable for interest on the deficiency assessment.

Appellant Thomas A. Curdie accepted employment with an agency of the United States Government commencing in June of 1974. At that time he resided outside this state. He was assigned to the San Francisco regional office of the agency on July 8, 1974. When appellant accepted employment, he agreed to work in whatever geographical area to which he would be assigned. The applicable federal regulation provided that unlike subsequent moving expenses of an employee, the expenses of an employee's first move were at his own expense. Consequently, appellant was not reimbursed for any of the expenses occasioned by his move from outside California to this state. On their 1974 state personal income tax return, appellants claimed a deduction of $3,077.96, reflecting these expenditures.

On that return, appellants did not properly compute a special tax credit against the tax to which they were entitled. Respondent made a correct computation thereof and thereby determined that there was no tax liability. Consequently, appellants received a refund from respondent of the entire amount of state income tax withheld from appellant's salary.

Subsequently, respondent audited appellants' return and disallowed the moving expense deduction. AS a consequence, respondent issued its assessment, and this anneal followed.

Section 17266 of the Revenue and Taxation Code allows a deduction for certain desiqnated moving expenses. Subdivision (d) thereof, however, limits this deduction with respect to interstate moves, by providing in relevant part:

> In the case of an individual whose former residence was outside this state and his new place of residence is located within this state, . . . the deduction allowed by this section shall be allowed only if any amount received as payment for or reimbursement of expenses of moving from one residence to another residence is includable in qross income ... and the amount of deduction shall be limited only to the amount of such payment or reimbursement or the amounts specified in subdivision (b) [of section 17266], whichever amount is the lesser.

Since appellant did not receive any reimbursement from his employer for these moving expenses, this statutory provision does not provide for the deduction claimed by appellants. (Appeal of Patrick J. and Brenda L. Harrington, Cal. St. Rd. of Equal., Jan. 11, 1978; Appeal of Norman L. and Penelope A. Sakamoto, Cal. St. Rd. of Equal., May 10, 1977; Appeal of Chris T. and Irene A. Catalone, Cal. St. Bd. of Equal., decided this day.)

Appellants nevertheless contend that the moving expenses are deductible for the following reasons: (1) they were mandatory moving expenses incurred as a consequence of employer's orders: (2) respondent's instruction booklet accompanying the return stated that "the qualifications for these items [moving expenses] are substantially the same for California as for federal income tax purposes," and the identical deduction on the federal return was allowed; and (3) after an initial review of the return, respondent refunded all the tax withheld; thus, it should he bound by that action. In view of all these circumstances, appellants also urge that interest should not be imposed.

Notwithstanding appellants' contentions, we do not agree that the moving expenses are deductible. First, it is settled that such moving expenses are personal, living, or family expenses, and not deductible business expenses, even if incurred because of orders of an employer, or at his request. (See Rev. & Tax. Code, §§ 17202, 17282; Int. Rev. Code of 1954, §§ 162, 262; Commissioner v. Mendel, 351 F.2d 580 (4th Cir. 1965); Commissioner v. Dodd, 410 F.2d 132 (5th Cir. 1969).)

Second, while the California and federal laws relating to the deductibility of moving expenses are substantially similar, they are not identical. It is precisely those limitations contained in Revenue and Taxation Code Section 17266(d) which have no federal counterpart. In addition, the instructions in respondent's booklet for the year 1974 stated:

> If you move into or out of California, the deduction for moving expenses is limited to the lower of the actual expenses incurred or the amount of payment for, or reimbursement of such expenses included in income.

Third, it has been consistently held that a taxing agency is not precluded by making tentative refunds of amounts claimed on taxpayer's returns from proceeding

in the ordinary manner to audit the taxpayer's returns for such years. (Richard E. Warner, ¶74,243 P-H Memo. T.C. (1974); Clark v. Commissioner, 158 F.2d 851 (6th Cir. 1946); Appeal of Dorothy M. Page, Cal. St. Bd. Of Equal., May 10, 1977.) In addition, section 19062.13 of the Revenue and Taxation Code provides that:

> Any action of the Franchise Tax Board in refunding the excess of tax withheld under Sections-18805 and 18806 or estimated tax paid under Section 18556 shall not constitute a determination of the correctness of the return of the taxpayer for purposes of this part.

We must also reject appellants' contention that no interest should be imposed on the proposed assessment. Section 18688 of the Revenue and Taxation Code specifically provides that interest upon the amount assessed as a deficiency shall be assessed, collected and paid in the same manner as the tax from the date prescribed for the payment of the tax until the date the tax is paid. In the absence of circumstances of grave injustice, this board has no authority to waive mandated statutory interest. (Appeal of Virgil E. and Izora Gamble, Cal. St. Bd. of Equal., May 4, 1976; Appeal of Patrick J. and Brenda L. Harrington, supra.) Such circumstances are absent here.

For the reasons stated above, respondent's action in this matter is sustained.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

Appeal of Thomas A. and Jo Merlyn Curdie

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Thomas A. and Jo Merlyn Curdie against a proposed assessment of additional personal income tax in the amount of $128.01, plus interest, for the year 1974, be and the same is hereby sustained.

Done at Sacramento, California, this 29th day of June, 1978, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member